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## **"Redeveloping" Corporate Governance Structures: Non-For-Profit Governance During Major Capital Projects, A Case Study at Lincoln Center for the Performing Arts**

### **Cover Page Footnote**

J.D., Harvard Law School, 1989; A.B., Harvard College, 1986; Vice President, General Counsel, and Secretary, Lincoln Center for the Performing Arts, Inc. Ms. Rosenthal plays a lead role in fashioning the legal context for the ongoing redevelopment projects on the Lincoln Center campus. She is also part of the management committee team that is modernizing how Lincoln Center manages retail sales, restaurant and catering transactions, and parking. In her role as secretary, Ms. Rosenthal regularly interacts with the board of directors, drafting corporate resolutions and advising on corporate governance matters. This essay benefited from helpful commentary on earlier drafts and at the March 30, 2007, Symposium by panelists Victoria Bjorklund, Esq., Simpson Thacher & Bartlett LLP; Harvey Goldschmidt, Professor, Columbia University School of Law and former Commissioner and General Counsel to the Securities and Exchange Commission; and Margaret S. Morton, Deputy Commissioner, Department of Cultural Affairs, City of New York; and also from comments on earlier drafts by Reynold Levy, President, Lincoln Center for the Performing Arts, and Linda Sugin, Professor, Fordham University School of Law. Perrine Meistrell, J.D., New York University School of Law School, 2005, and B.A., Princeton College, 2002, assisted in the preparation of this essay. Thanks to Cecelia Gilchrist, Assistant Corporate Secretary of Lincoln Center for the Performing Arts, for gathering, organizing, and reviewing source material, and to Caroline Barnard, Harvard Law School, 2008, who also prepared early materials for this essay.

# **“REDEVELOPING” CORPORATE GOVERNANCE STRUCTURES: NOT-FOR-PROFIT GOVERNANCE DURING MAJOR CAPITAL PROJECTS**

## **A CASE STUDY AT LINCOLN CENTER FOR THE PERFORMING ARTS**

*Lesley Friedman Rosenthal\**

### INTRODUCTION

The nation’s great not-for-profit institutions are in a growth mode.<sup>1</sup> Recently, *The New York Times* devoted an entire section to the construction of new museums around the world, including those in New York, Denver, Columbus, Minneapolis, and Abu Dhabi.<sup>2</sup> Existing cultural facilities are sprouting new or expanded wings, including majestic new galleries at the Metropolitan Museum of Art in New York<sup>3</sup> and a dramatic expansion at the

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1. *E.g.*, *The Great Buildup*, N.Y. Times, Mar. 28, 2007, at H1 (a special pull-out section devoted to new construction in the museum sector).

2. *Id.* at H1–2, H18.

3. The Metropolitan Museum of Art opened new Greek and Roman galleries on April 20, 2007.

Museum of Modern Art in New York that nearly doubled its size.<sup>4</sup> Great institutions of higher learning—Fordham, Harvard, Columbia, and many others—are expanding their facilities and operations. New or refreshed sports stadiums have recently opened or are in the works in New York; New Jersey; Dallas; Washington, D.C.; St. Louis; and elsewhere, often with significant investment of public as well as private dollars. In the performing arts sector, too, major building projects are underway or recently completed, including at Lincoln Center for the Performing Arts in New York; the Kennedy Center in Washington, D.C.; and performing arts centers in Orange County, California, and in Orlando and Miami, Florida, among others.

The reasons for this explosive growth are many: the evolution of new artistic dreams and the opportunity to realize them; the promise of applying twenty-first-century technology to enhance both access and content; and, on a less lofty plane, the need to address deferred maintenance and aging infrastructure.

Major capital projects often signify turning points in the life of a not-for-profit organization. More money is likely to flow into and out of the organization during a major capital project than at any other time during the organization's life cycle.<sup>5</sup> Accordingly, once-in-a-generation capital projects—much like other critical moments in the life cycle of a charitable organization, such as creation, merger, and dissolution—require heightened involvement by trustees, meaning greater involvement and greater oversight than would otherwise required.

Because capital projects impose unusual legal, financial, risk management, and other obligations on charitable organizations, the familiar principles of not-for-profit good governance become amplified and require even greater attention. What special obligations do trustees have to help their organizations manage such an undertaking? What are the broader impacts of the project on the organization as a whole—on its balance sheet, on its institutional identity, on its program and its future plans? If the project is funded in part or in whole with public funds, or if the project involves acquisition of or changes to publicly owned or accessible spaces, how might trustees facilitate needed communications with the public and with government officials? How should trustees, staff, and government work together to see the project matters through to successful completion and operation?

At the same time, as a result of highly visible corporate scandals in both the for-profit and not-for-profit sectors, good governance practices are undergoing a significant climate change, including redefinition of the duty of care, new statutory requirements, and a shifting landscape of checks and

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4. MoMA.org, About MoMA: The New MoMA, [http://www.moma.org/about\\_moma/newmoma.html](http://www.moma.org/about_moma/newmoma.html) (last visited Sept. 5, 2007).

5. See Robin Pogrebin, *Grand Plans and Huge Spending*, N.Y. Times, Mar. 28, 2007, at H24 (discussing the cost of expansion plans for major cultural institutions).

balances. For entities receiving public funding, both operational and capital, there is the prospect of making a portion of such funding contingent on the funding recipients' adherence to governance standards.

This complex new array of duties and expectations is challenging enough to adapt to during "normal" times in an institution's life span. What special duties and expectations apply when the organization, or indeed the whole sector, is going through a "revolutionary" period of expansion or transition?<sup>6</sup> This essay studies the current governance practices of a major institution in transition, and compares these governance practices to a prior generation's handling of an earlier transitional moment. It is hoped that a comparison of governance practices during a time of heightened attention to such matters can help clarify what may be expected, and what is achievable by others, in both normal and transitional times.

Because of the dearth of study materials pertaining to governance of mature not-for-profit institutions in a time of growth and transition, it is exciting to have access to documents and individuals that detail how governance matters were handled during a major capital project. Even more engaging is the prospect of comparing that same institution's handling of governance practices a generation later, when a new series of major capital projects are undertaken during this time of heightened scrutiny of governance practices. What, if any, different approaches is the institution taking in light of the current evolution in best practices? How, if at all, did the earlier work presage what has come to pass later on, and how has that learning been retained and transmitted? How are current practices becoming enshrined for future reference, and what do they suggest about what future standards should be?

Part I of this essay describes the shifting corporate governance landscape, and sets forth the ways in which major capital undertakings may impact not-for-profit corporate governance structures and practices. Part II discusses in detail how from 1980 to 1990 the board of directors of Lincoln Center for the Performing Arts, Inc., (LCPA) a not-for-profit organization in New York City, rose to the challenges of its first major capital construction project—a student dormitory and additional administrative and performing arts facilities—some twenty years after the original campus was constructed. Part III discusses the current series of redevelopment projects

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6. *See generally* Thomas S. Kuhn, *The Structure of Scientific Revolutions* (2d ed. 1970) (observing that the history of science is marked by periods of "normal" science, in which most research and activity takes place within a standard set of beliefs or procedures, and "revolutionary" periods, or paradigm shifts, in which new discoveries call for the discarding of standard beliefs or procedures, replacing those components of the previous paradigm with others). The arc of Kuhn's model—the "fits-and-starts" nature of scientific progress, where periods of intense progress are followed by plateau periods—seems to fit in many respects the arc of growth for mature not-for-profits. On this model, institutions may go through plateau periods of "normal" programmatic activity for many years, punctuated by once-in-a-generation periods of "revolutionary" growth and change: a major new acquisition, merger with another organization, or a significant refurbishment, enhancement and/or enlargement of physical premises.

at Lincoln Center, which are expected to last into the next decade, and the contemporaneous introduction of new and enhanced governance practices. Part IV assesses the performance of the organization's governance practices under evolving standards, with special attention to how those standards play out during a time of institutional transition. Part V concludes with some observations about whether and how practices being developed today may serve this and other organizations in later years and projects to come.<sup>7</sup>

## I. GENERAL PRINCIPLES OF NOT-FOR-PROFIT CORPORATE GOVERNANCE

### A. *Good Governance Practices Are in Transition*

Some of the familiar hallmarks of good governance in not-for-profit corporations are strong internal controls, external accountability, transparent financial management, regular and effective communications, effective and ethical fund-raising and development, and a management structure that uses its human and other resources to advance the charitable purpose of the organization.<sup>8</sup> These characteristics provide a culture of checks and balances among trustees and staff.

Directors and officers are legally bound to exercise fiduciary duties to the organization:<sup>9</sup> (1) the duty of care, which requires familiarity with the organization's finances and activities and regular participation in its governance; (2) the duty of loyalty, which requires directors and officers to act in the interest of the corporation and to avoid or disclose conflicts of interest or transactions that might appear to create conflicts of interest; and (3) the duty of obedience, which requires directors and officers to insure that the organization complies with the applicable laws and regulations and its internal governance documents and policies.

In the wake of recent notable scandals in both the for-profit and not-for-profit sectors, these well-established duties have been revisited. The not-for-profit governance recommendations that New York's then-Attorney

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7. Of course, the approach to governance during multiyear, multifaceted, hundred-plus million-dollar projects may or may not be applicable to smaller or less mature not-for-profit organizations, or even comparable organizations undertaking less sizable projects. The goal of this essay is not to overgeneralize Lincoln Center's experience, but rather to provide one example of an approach to corporate governance during a particularly dramatic time in which major institutional transition coincides with a paradigm shift in the standards of governance being applied to it.

8. N.Y. Att'y Gen. Andrew M. Cuomo, Charities Bureau, Internal Controls and Financial Accountability for Not-for-Profit Boards (2005), *available at* [http://www.oag.state.ny.us/charities/internal\\_controls.pdf](http://www.oag.state.ny.us/charities/internal_controls.pdf); *see also* N.Y. Times, Cmty. Affairs, Nonprofit Excellence Awards, <http://www.nytimes.whsites.net/communityaffairs/programs/nonprofit.html> (last visited Oct. 28, 2007) (describing criteria under which awards are presented to New York City-area nonprofit organizations for excellence in organizational management).

9. N.Y. Att'y Gen. Andrew M. Cuomo, Charities Bureau, Right from the Start: Responsibilities of Directors and Officers of Not-for-Profit Corporations (2005), *available at* [http://www.oag.state.ny.us/charities/not\\_for\\_profit\\_booklet.pdf](http://www.oag.state.ny.us/charities/not_for_profit_booklet.pdf).

General Eliot Spitzer proposed in 2004, in the form of amendments to the New York Not-For-Profit Corporation Law,<sup>10</sup> would have sought to ensure that directors and officers upheld these duties by making them subject to Sarbanes-Oxley-like provisions. Such provisions would have required corporate officers to sign the corporation's annual report, would have mandated the appointment of audit committees, and would have sought to prevent "self-dealing" transactions. In essence, Spitzer wanted to prevent fraud in nonprofit corporations in addition to for-profit corporations. Although this bill was ultimately withdrawn, the governance guidelines Spitzer outlined are nonetheless regarded by many as valuable guideposts. These include establishing an audit committee, an executive committee, and a comprehensive conflicts of interest policy; requiring verification of annual reports; authorizing the removal of directors and officers who engage in willful or persistent failure to file accurate annual reports; and limiting the scope of indemnification for directors and officers.<sup>11</sup> Additional Sarbanes-Oxley-type practices that are becoming common among nonprofits are whistle-blower policies and codes of ethics.<sup>12</sup>

In recent times, private sector commentators have also begun articulating additional aspects of the traditional duty of care: a duty of attention (encompassing, among other things, regular attendance at board and committee meetings, careful review of meeting minutes and notation to secretary of any error or misinterpretation, regular monitoring of delegated responsibilities, periodic meetings with or visits to management personnel and other employees to inquire about corporate entities' activities within their purview, and access to and the opportunity to ask questions of outside experts such as lawyers, accountants, and investment advisors); a duty of informed decision making (including the opportunity to hear detailed presentation by management, the advice and recommendation of outside experts, including legal counsel, the opportunity to debate and deliberate proposals and allow time for consideration, the gathering of information on how comparable institutions dealt with similar problems, and the opportunity to request additional information deemed relevant by outside experts); careful delegation of management and oversight responsibilities (including the ability to make investments pursuant to sections 512 and 514 of the Not-for-Profit Corporation Law); and compliance with the business judgment rule.<sup>13</sup> While it is unclear whether these proposed new facets of

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10. Press Release, N.Y. Att'y Gen. Eliot Spitzer, Proposed Reforms to State Corporate Accountability Laws (Mar. 12, 2003), [http://www.oag.state.ny.us/press/2003/mar/mar12a\\_03.html](http://www.oag.state.ny.us/press/2003/mar/mar12a_03.html).

11. N.Y. State Bar Ass'n, Special Comm. on Sarbanes-Oxley Issues, Report and Recommendations to the Executive Committee on Sarbanes-Oxley Issues 17-18 (2006) (on file with author).

12. Paul Macari et al., Best Practices in the Ongoing Operation of the Not for Profit Organization: Organizational Issues (2006).

13. Anita Pelletier & Scott R. Simpson, Best Practices in the Ongoing Operation of the Not-for-Profit Organization: Board Functions (2006).

the traditional duty of care will gain traction, they do appear to be in tune with general trends.

Simultaneously, economic forces are requiring not-for-profits to expand their commercial activities, creating new streams of revenue and diversifying the traditional bases of earned and contributed income. And demographic forces are driving many not-for-profits, particularly in the cultural sector, to be more inclusive, broadening and diversifying the communities to which they historically appealed. Accordingly, not-for-profit board members are increasingly being asked to play more of an ambassadorial and business-oriented role, not only to uphold the institution's mission, but also to help shape or reshape it; not only to "give or get" financial contributions, but also to think strategically and help build alternative resources; not only to share knowledge, but also to continuously learn and revitalize; not only to participate, but also to diversify, reaching out to include those who may have been historically underrepresented by race, ethnicity, gender, geography, age, industry, and viewpoint.<sup>14</sup>

This complex new array of duties and expectations is challenging enough to adapt to during "normal" times in an institution's life span, but what special duties and expectations apply when the organization is going through a period of expansion or transition?

#### *B. Special Governance Challenges During Major Capital Projects*

Commentators have noted that not-for-profit organizations go through life cycle stages, including start-up, adolescence, maturity, and decline.<sup>15</sup> Little has been written, however, about important inflection points within organizations enjoying extended periods of maturity. Such inflection points are pivotal moments of growth or change, such as an expansion of operations, a merger, or a major capital project, each of which requires strong management, vision, and board oversight. While not-for-profit corporations and their constituents must always adhere to the core principles of corporate governance, doing so is especially critical when the not-for-profit is in a period of such change.

A major construction project is a milestone for any organization, but particularly a not-for-profit corporation. A major capital project that includes expanded or reconfigured facilities is often triggered by enrichment of programmatic offerings and ancillary services. Such activities are a welcome sign of institutional growth, but like any transition, may entail new and unfamiliar roles. For example, the corporation becomes, in addition to the operator of its ordinary and expanded programmatic activities, the "owner" of a construction job site, responsible

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14. The Source #12: Twelve Principles of Governance That Power Exceptional Boards (BoardSource ed. 2005).

15. See, e.g., Paul M. Connolly, *Navigating the Organizational Lifecycle: A Capacity-Building Guide for Nonprofit Leaders* (2006).



for initiating, managing, and paying for the project.<sup>16</sup> Construction work by its nature imposes special burdens, including legal, regulatory, financial, community relations, and risk management concerns.

- *Legal:* Construction projects require compliance with a set of laws, building codes, permit applications, and other regulations that may be unfamiliar to the organization. Additionally, if the project receives public funds, it may be subject to strict bidding requirements, “buy local” rules, labor laws such as New York’s Wicks Law,<sup>17</sup> prompt payment laws, minority- and women-owned business guidelines, and other regulations that may be conceptually distant from the organization’s normal programmatic activities.<sup>18</sup> Further underscoring the importance of real estate related transactions by not-for-profits, the New York Not-for-Profit Law requires a supermajority of the board to vote on the acquisition, disposition, mortgage, or leasing of real property.<sup>19</sup>
- *Financial:* Construction projects, and the capital campaigns that are often necessary to execute them, may cause more money to flow through the corporation than at any other time in the life cycle of the organization. As a result of its heightened fundraising and spending activities, the organization may borrow, enter the public debt markets, mortgage or otherwise encumber its real property, make covenants on future income, revisit its investments and spending policies, and engage in more fundraising-related activity than ever before.
- *Community and government relations:* In addition, construction projects will inevitably cause the organization to engage to an even greater extent than before with local neighbors, community, and government. Landmarks groups, community organizations, business improvement districts, and other official, quasi-official, and unofficial groups of neighbors and other stakeholders will inevitably weigh in.
- *Risk management/insurance:* Major capital projects may also require an organization to revisit risk management strategies. Construction is an inherently risky venture;<sup>20</sup> Workers may strike; weather may be unseasonable; needed supplies may suddenly become unavailable or prohibitively expensive; subsurface conditions may significantly differ from what parties expected; and the plans and specifications may be inaccurate or

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16. Robert A. Rubin et al., *New York Construction Law Manual* § 1:8 (Thomson West 2d ed. 2006).

17. N.Y. Gen. Mun. Law § 101 (McKinney 2007); N.Y. State Fin. Law § 135 (McKinney 2007). Together, these statutes are commonly referred to as “Wicks Law.”

18. Rubin et al., *supra* note 16, § 1:8.

19. N.Y. Not-for-Profit Corp. Law § 509 (McKinney 2007).

20. Rubin et al., *supra* note 16, § 2:36.

incomplete.<sup>21</sup> Any of these circumstances, and others—scope changes, disagreements among stakeholders, unavailability of expected sources of funding or financing, unforeseen logistical issues, presence of toxic or hazardous materials—may delay the project, or increase its cost and/or risk. Construction projects require a not-for-profit to make special arrangements for insurance, indemnification, and other risk allocation and distribution strategies, and then monitor those strategies on an ongoing basis.

In short, what may be regarded as virtually inevitable for those in the building trades may come as an unwelcome surprise for charitable organizations undertaking once-in-a-generation construction projects. A leading textbook in construction law asserts that “[i]t is probably safe to say that there has never been a building built exactly as envisioned,”<sup>22</sup> and “[r]are is the construction project that is complete by the date specified in the contract.”<sup>23</sup> What, if any, special obligations do trustees have to help their organizations manage the impacts of such an undertaking?

Because of the unusual legal, financial, community relations, and risk management aspects of construction projects, among others, the core principles of not-for-profit good governance, set forth above, become amplified and require even greater attention. The administration and board must effectively manage the project through the establishment and maintenance of internal controls.<sup>24</sup> The board should make sure that requisite management infrastructure is in place, and that the board is in a position to adequately oversee the administration of the project. Assembling a management team with the expertise necessary to guide such growth is a key factor. Demanding and achieving accountability is another. In addition, the board should organize committees or subcommittees that can effectively allocate the institution’s resources, execute the responsibilities delegated to them, and keep the full board aware, through regular and special presentations, reports, and updates, of how the project is proceeding against overall project goals.<sup>25</sup> The board, after reasoned deliberation duly recorded in the minutes of meetings, should provide corporate resolutions for authorization of major decisions regarding budget, spending authorizations, financing, fund-raising, key staffing decisions, design plans, and schedule and logistics.

Such record keeping is not just a matter of good form; it sets the stage for internal and external accountability and controls, and ensures that board members fulfill their fiduciary duties by active and ethical participation in

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21. *Id.*

22. *Id.* § 6:1.

23. *Id.* § 7:1.

24. U.S. Gen. Accounting Office, GAO-05-516T, Kennedy Center: Stronger Oversight of Fire Safety Issues, Construction Projects, and Financial Management Needed 16–18 (2005) (statement of Mark L. Goldstein, Dir., Physical Infrastructure Issues), available at <http://www.gao.gov/new.items/d05516t.pdf>.

25. *Id.* at 30–31.

the decision-making process. It also provides a historical record for later generations of trustees and administrators to study, emulate, or improve.

It is instructive to study the experience of one large, institutional nonprofit organization as it has progressed through two generations of major capital work: one in the pre-Sarbanes-Oxley days, and now, more contemporaneously. The experiences of LCPA, a New York not-for-profit and leading cultural institution, prove instructive. What governance procedures did it follow while carrying out a \$100 million capital project—the construction of the Rose Building—from 1980 to 1990, and what differences can be observed today, as it works through a more complex \$700 million renovation of major facilities at a time of generally heightened attention to governance matters?

## II. CASE STUDY: LINCOLN CENTER'S ROSE BUILDING, 1980–90

### A. *Lincoln Center Prior to 1980*

LCPA is the world's largest performing arts complex, hosting twelve resident arts organizations that represent the entire span of performing art forms: opera, symphonic music, film, theater and dance, and more. LCPA manages this complex and also presents its own artistic programming. In addition, LCPA is a leader in arts education and community relations.

LCPA was incorporated on June 22, 1956, as a nonprofit institution

to sustain and encourage the musical and performing arts. . . . It was authorized to own real estate in the Lincoln Square project, to erect buildings on that site, . . . and, to encourage, sponsor, or facilitate performances and exhibitions, to commission the creation of new works, and voluntarily assist the education of artists and students of these arts.<sup>26</sup>

Several resident organizations formed the original group of Lincoln Center constituents: the Metropolitan Opera, the New York Philharmonic, the New York City Opera and New York City Ballet, and the Juilliard School. The groundbreaking occurred in 1959, and Lincoln Center's original buildings were completed in 1969.

LCPA owns most of the 16.3 acres of the original campus, with the City of New York owning the balance. Initially, LCPA's primary role was landlord and steward of the physical campus, playing a coordinating and administrative role among the various resident organizations—each of which was its own freestanding 501(c)(3) corporation<sup>27</sup> with its own

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26. Edgar B. Young, *Lincoln Center: The Building of an Institution* 51 (1980).

27. By definition, 501(c)(3) organizations are charitable, religious, educational, scientific, or literary; test for public safety; foster national or international amateur sports competition; or prevent cruelty to children or animals. I.R.C. § 501(c)(3) (2000 & Supp. 2006). See generally Elizabeth Ardoin, *Organizational Test—I.R.C. 501(c)(3)*, 2004 EO CPE Text, available at <http://www.irs.gov/pub/irs-tege/eotopicd04.pdf> (discussing the test to determine whether an organization may be classified as a 501(c)(3)) (last visited Sept. 12, 2007).

balance sheets, boards, and administration—by virtue of a set of constituency agreements that LCPA holds with each resident organization. In addition, the LCPA board includes representatives designated by each of the constituent organizations.

Over the years, LCPA has also taken on the role of presenter, serving unmet artistic needs of the community, filling the concert halls that otherwise would be dark during the off seasons, and providing arts offerings in disciplines not otherwise regularly represented on the campus. Several of these arts initiatives were so successful that LCPA spun them off as separate, freestanding not-for-profit corporations of their own: the Chamber Music Society of Lincoln Center in 1969, the Film Society of Lincoln Center in 1987, and Jazz at Lincoln Center in 1996. Other new constituents were drawn by the rich ferment of arts activity, including the Lincoln Center Theater in 1980 and the School of American Ballet in 1987. In all, there are now thirteen constituents comprising Lincoln Center.

By the time the center was twenty years old, it was clear that these new programs, new constituents, and new activities would require additional space. Indeed, even when the original campus construction was completed, Lincoln Center's founders knew that future expansion was inevitable. For instance, the founders had always planned on building dormitories for the Juilliard School but did not initially have the funds to do so.<sup>28</sup>

#### B. *A Project Is Born and an Institution Is Remade*

Beginning in the early 1980s, Chairman Martin E. Segal led Lincoln Center to commence, and ultimately, in 1991, to complete, its first major new building project since the opening of the center: the construction of the Samuel B. and David Rose Building. In addition to providing safe, convenient, and affordable housing for Juilliard conservatory students and students of the School of American Ballet, the new building also provides additional performance, administrative, and educational facilities for constituents.

The project was a major undertaking by eleven resident organizations. In the end, the ten-story, 235,000-square-foot institutional portion of the building would contain a 268-seat theater for the Film Society of Lincoln Center; a dining hall; television production facilities for the *Live from Lincoln Center* telecasts; archival space; dance studios, classrooms, and dressing rooms for the School of American Ballet; a workshop/studio theater and a library for the Lincoln Center Institute; ballet rehearsal studios, a costume shop, dressing rooms, an education department, and dancers' lounge for the New York City Ballet; rehearsal space for the Chamber Music Society of Lincoln Center; office and management facilities for eight of the campus organizations; the Riverside Branch of the

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28. Stephen Stamas & Sharon Zane, *Lincoln Center: A Promise Realized, 1979–2006*, at 112 (2007).

New York Public Library; and a new home for the New York City Fire Department's Engine Company 40 and Ladder Company 35. Above the base building stands an eighteen-story residence hall tower for students of Juilliard and the School of American Ballet,<sup>29</sup> and adjacent to it a privately owned sixty-story condominium tower.

At the time the project was being planned, its purpose was to provide space for existing and readily foreseeable needs.<sup>30</sup> But once the planning was underway, the prospect of a new building inspired further enhancements to Lincoln Center operations and activities, leading to scope changes and a more ambitious project. As the scope of the project grew, so did the budget, from an original estimate of \$30 million to a final figure of \$100 million. The physical expansion was inspired by, and itself necessitated, a broader institutional vision.

Executing the project required several complicated real estate transactions, including a \$6 million purchase of land from the City of New York for the site of the new building. In addition, Lincoln Center negotiated to sell the air rights from that property and adjacent Lincoln Center property to a private condominium developer for \$48 million, which provided nearly half the funds for the construction effort. The project was further complicated by the multiple uses to which the space would be put and the eleven separate clients who would occupy it. These and other complexities required deep and expert engagement by the board.

### 1. "Expertising" the Board and Assigning Roles

The board of directors and executive committee oversaw major aspects of the capital project, with and through existing structures such as the audit committee and general services committee, as well as through newly formed committees such as the new building committee and an architectural selection subcommittee. In addition, the constituent organizations were an integral part of the negotiation and planning process,<sup>31</sup> and the LCPA board played a coordinating role among the constituent organizations through their designees to the board.

The Lincoln Center board is led by its chair. In the early stages of the Rose Building project, Martin E. Segal served as chairman of the board. In June 1986, Segal was succeeded by George Weissman, who served for the duration of the project and beyond. Nathan Leventhal, who had been the deputy mayor of New York City from 1979 to 1984, after serving as the commissioner of housing preservation and development in 1978 and

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29. *Id.* at 127.

30. Interview with Nathan Leventhal, President Emeritus, Lincoln Center, in N.Y., N.Y. (Jan. 16, 2007).

31. See Lincoln Center for the Performing Arts, Inc., (LCPA) Board Meeting Minutes 4-7 (Oct. 30, 1980) (on file with author).

1979,<sup>32</sup> was elected president of the organization in June 1984, and served in that capacity until December 2000.

At the time of the Rose Building project, the board consisted of approximately thirty-five to forty members. Although the board did not at that time consciously seek to increase its size or add new members with relevant expertise to the project,<sup>33</sup> there were several trustees who were particularly knowledgeable in pertinent disciplines, and they were instrumental in the Rose capital construction. Three of these trustees are specifically worth mentioning.

The prominent real estate developer and philanthropist Frederick P. Rose, initially a trustee of Lincoln Center constituent the New York Philharmonic and later a member and vice chair of the LCPA board, was appointed to the new building committee and eventually served as its chair. Rose was also the principal donor and fund-raiser for the new facility, and the building would ultimately bear the Rose family name.

Trustee Willard C. Butcher was the chairman and chief executive officer of Chase Manhattan Corporation and its principal subsidiary, the Chase Manhattan Bank. In addition to his advocacy of private enterprise and involvement in civic and charitable activities, Butcher guided an extensive international expansion plan for Chase, during which the bank added numerous subsidiaries and services overseas.

Harry Helmsley, founder of one of the biggest property holding companies in the United States, whose properties included at one time the Empire State Building and the Helmsley Building in New York City, also served as trustee to Lincoln Center during this time. Helmsley appointed his special assistant to serve on the new building committee.

In the political arena, the board at that time also included John Lindsay, who was mayor of New York City from 1966 to 1974, and who joined the board in 1984. Gordon Davis, who joined the board in 1982, had served as a commissioner of the New York City Planning Commission and had experience in the private sector as a real estate lawyer. Davis, in conjunction with Lincoln Center President Nathan Leventhal, helped guide the organization through the city's complex Uniform Land Use Review Procedure (ULURP). Their experience in city government was beneficial as they dealt with the Community Board, the City Planning Commission, and the Board of Estimate Hearings.<sup>34</sup> The board, in accordance with its bylaws, includes the commissioner for cultural affairs and the Parks Department commissioner, and also has ex officio members designated by the mayor and the City Council speaker. A number of the Lincoln Center trustees also served on boards of other major nonprofits, providing

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32. Interview with Nathan Leventhal, *supra* note 30.

33. *Id.*

34. Stamas & Zane, *supra* note 28, at 121-22.

information about comparable circumstances that could inform board members' judgments.<sup>35</sup>

Retaining consultants with experience on comparable projects also enriched the pool of information available to the board and staff during the project. For example, an attorney and planning consultant retained by the new building committee had helped to devise an innovative strategy for the Museum of Modern Art a few years earlier, involving the sale of air rights to fund the museum's tower expansion. The planning consultant suggested that Lincoln Center could pursue a similar strategy, funding construction of the Rose building in part through sale of air rights to a residential apartment tower to be constructed nearby.<sup>36</sup> That transaction was ultimately consummated, and it provided nearly half the funds for the construction of the building.<sup>37</sup>

## 2. Adjusting the Board's Committee Structure to Meet Project Demands

Even as the new building structure took shape, new governance infrastructure was put into place. The board of directors redefined the responsibilities of its executive committee in connection with the new building. In December 1983, the board approved and authorized the executive committee to make final decisions on the scope of the new building and gave it direction for new subcommittees.

Lincoln Center's general services committee, in existence since 1966,<sup>38</sup> also took on new and expanded roles. The general services committee is responsible for managing the costs and services of the Lincoln Center complex. During the Rose Building project, the general services committee worked in conjunction with the board and executive committee to prepare for incorporating the new building into Lincoln Center, including taking

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35. For example, Frederick P. Rose served at the Metropolitan Museum of Art, the Asia Society, Mount Sinai Hospital, the Children's Aid Society, the American Museum of Natural History, and Rockefeller University. Chairman Martin E. Segal served on the board of the Institute for Advanced Study at Princeton, Young Audiences, Inc., and Harvard School of Public Health. Chairman George Weissman was a board member of the Whitney Museum of American Art and the American Academy in Rome. Willard C. Butcher, cochair of the building committee for the Rose Building served on the board of Brown University. Louis V. Gerstner, Jr., served as a board member of the New York Public Library. June Noble Larkin served on the board of the Museum of Modern Art. Anthony D. Marshall served on the boards of the Vincent Astor Foundation, Brown University, New York Zoological Society, WNET/Channel 13, Metropolitan Museum of Art, Museum Trustees Association, and Ocean Liner Museum and Seamen's Church Institute. Many LCPA board members were also members of constituent boards, in addition to those members designated by the constituents.

36. Stamas & Zane, *supra* note 28, at 114.

37. In another example of the use of comparable institutions' experiences, the executive committee examined the Museum of Modern Art's use of a transfer tax payment strategy to effectuate new facility needs. LCPA Board Meeting Minutes 7 (Oct. 30, 1980) (on file with author); LCPA Executive Committee Meeting Minutes 8 (Sept. 13, 1979) (on file with author).

38. LCPA Board and Members Meeting Minutes 4 (June 13, 1966) (on file with author).

account of potentially increased operating costs of the campus as a whole, and anticipating how to manage its costs. In 1985, the board formally expanded the mandate of the general services committee to include the new building.

The following year, a new permanent committee, the building operations committee, was established to take "responsibility for and authority to direct the operation" of the Rose Building, including determining operating and capital budgeting, establishing reserves, and electing representation to the campus-wide general services committee.<sup>39</sup> The establishment of the Rose Building operations committee and the delegation of a Rose Building representative to the campus-wide general services committee were two permanent governance changes brought about by the Rose Building project. By contrast, the new building committee was dissolved in 1991 when its work was complete.<sup>40</sup>

An audit committee was first established in 1978 at the recommendation of Lincoln Center's outside auditors. The committee's mandate was to provide a formal review of the board for financial information distributed to interested parties and the general public, to review decisions made by the board, and to report to regulatory agencies. Its duties were (1) to review significant financial information and give assurance that the information was accurate and timely and that it included all appropriate disclosures; (2) to ascertain the existence of an effective accounting and internal control system; (3) to oversee the entire audit function, both independent and internal; (4) to provide a communication link between the auditors and the board of directors; and (5) such other duties and responsibilities as may be assigned by the chairman.<sup>41</sup> The audit committee was to consist of at least three directors to be appointed by the executive committee. The audit committee was active throughout the construction and thereafter, and it was the committee's practice to meet with both internal and external auditors to ensure that the fiscal affairs of Lincoln Center are "sound and in good order."<sup>42</sup>

There was no finance committee at that time, nor was there an explicit requirement that members of the audit committee be sophisticated in financial matters or independent of the organization.

### 3. Regular Interactions Between Key Staff and Board Members

Consistently throughout the project, at regular meetings of the board and executive committee, board leadership, key staff members, and outside consultants updated the board on every aspect of the project.

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39. The North Building at Lincoln Center Final Participants Agreement § 8.3 (1987) (on file with author).

40. LCPA Annual and Regular Meeting of the Board and Members Minutes 8 (June 17, 1991) (on file with author).

41. LCPA Board Meeting Minutes 12 (Feb. 27, 1978) (on file with author).

42. LCPA Board Meeting Minutes 7 (Oct. 5, 1981) (on file with author).



A core group of staff members at Lincoln Center guided the capital construction, including senior executives with significant experience in operations, facilities, finance, law, public affairs, and development. The organization hired architects and contractors, and also brought in outside specialists as consultants and subcontractors.

Approximately twenty board members, staff members, and outside project consultants met regularly—at times, as often as once a week—to discuss the details of the construction. Staff prepared weekly agendas for each meeting.<sup>43</sup>

In addition, the executive committee and the board as a whole were briefed on the project at nearly every meeting from early 1984 until the occupancy of the building in 1992.<sup>44</sup> Briefings covered technical matters such as construction bidding, arcane governmental processes, and complex legal agreements, as well as more traditional board fare, such as fund-raising progress and comparisons of actual cost to budget. Other matters pertaining to the construction were also brought before the board for discussion and resolution, including the construction and financing of a parking garage beneath the building.

Corporate records reflect that executive committee members also received written memoranda updating them on the status of the project on topics such as staff activities, revision in project costs and estimates, market indications, tax issues, and surveys on topics such as transportation needs and garage use.<sup>45</sup>

The board of directors maintained responsibility and authority for the fund-raising campaign. Regular access to accurate information about cost increases helped the board plan the campaign more effectively, letting them reach agreement upon increases to its fund-raising goals. The board, recognizing that the organization lacked “the staff or the experience for a major capital campaign fund drive,” retained a professional fund-raising firm that provided clear guidelines on the solicitation and use of funds.<sup>46</sup> The board was involved in and regularly apprised about the progress of the capital campaign, through early successes—including a \$15 million lead gift from Frederick P. Rose and his wife Sandra and a \$10.1 million donation from the City of New York—through the recessionary period of the late 1980s, and ultimately to completion of its \$100 million goal.<sup>47</sup>

There were also frequent communications to, from, and among the board regarding the relationship of the project to the City of New York and the local community. Records reveal that the executive committee became

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43. Interview with Nathan Leventhal, *supra* note 30.

44. These meetings are held monthly except during July and August.

45. *E.g.*, Memorandum from Richard H. Koch, LCPA Const. Project Consultant, on Status of New Bldg. Project to the Members of the Bldg. Comm. (Nov. 9, 1981) (on file with author). The new building program was distributed to the executive committee in April 1984. *Id.*

46. Stamas & Zane, *supra* note 28, at 119 (quoting then-Chairman George Weissman).

47. *Id.* at 119–21.

familiar with the ULURP process and schedule as well as the community board process, and was briefed on the retaining of a community relations firm. Lincoln Center decided that it was crucial for the planned new branch of the New York Public Library to have its entrance to the Rose Building on Amsterdam Avenue, facing the community. Responding to a frequently lodged critique against the original Robert Moses plan, this entrance reflected Lincoln Center's commitment to the local community and desire to embrace all visitors.<sup>48</sup>

*C. Special Challenges Demanding Intense Board Involvement and Activity*

1. Allocations of Space, Resources, and Responsibilities  
Among Resident Organizations

One of the most difficult issues Lincoln Center faced was "reaching a satisfactory agreement with the participating resident organizations on how to allocate annual operating costs for the new building and on deciding who would own it."<sup>49</sup> Inter-constituent negotiations led to the development of a participants' agreement for the new building which would serve as an official documentation of Lincoln Center's and the constituents' financial and institutional relationship with the new building. Under an agreement initially reached in 1985 and confirmed in 1987, each participant accepted responsibility for the management and maintenance of its own space, and agreed that LCPA would manage the project and own the building, providing each participating constituent with a ninety-nine-year lease.<sup>50</sup>

Pursuant to the participants' agreement, every one of the eventual participants in the building shared pro rata in the economic benefits of the air rights transfer, as gross proceeds of the sale were allocated by Lincoln Center in a proportion equal to each participant's respective building participation ratio.<sup>51</sup> The proportionality was maintained as the building transitioned from capital expenses to operating expenses: the resident organizations now share the maintenance costs on the same proportionate basis on which the proceeds from the sale of the air rights was allocated.

The executive committee and ultimately the board of Lincoln Center discussed and then formally approved the start-up costs and the execution of the interim agreements.

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48. *Id.* at 121-26.

49. *Id.* at 117.

50. *Id.* at 117-19.

51. The North Building at Lincoln Center Final Participants' Agreement § 5.1 (1987) (on file with author).

## 2. Closing Out the Project and Reckoning with a Substantial Increase in Cost

The project rose in cost from an initial estimate of \$30 million to a total of just over \$100 million. Reasons for the increases in cost included increased scope, changes in design, underestimates for certain costs, labor and supply issues, schedule delays and associated logistics premiums, and higher interest costs because of the extended schedule and some delays in the capital campaign. Although cost overages are common in construction projects, the increase in this case warranted—and received—frequent attention from the new building committee and the board.

The board and executive committee were apprised of detailed information on projected and actual costs and increases in costs in real time as they arose. The minutes reveal detailed discussions of specific amounts and percentages of change from prior estimates at seven or more meetings during that period. In addition, the board—and/or executive committee—was also briefed generally about increases in costs at five other meetings. Written communications between meetings further kept trustees apprised of escalating costs and other matters pertaining to the project. The board received briefings on the general progress on the project at nearly every board and executive committee meeting throughout the process.

Moreover, trustees and management anticipated and planned for the operating costs of the building long before completion, establishing a building endowment to capitalize the first few years of operating costs. This endowment smoothed the transition from the capital phase to the operating phase, easing the impact on operating budgets.

The building was fully occupied in the spring of 1991, to critical acclaim by architecture critics<sup>52</sup> as well as to the satisfaction of eleven separate clients. In February 1992, the executive committee made a preliminary projection of final costs which represented a \$6.7 million increase from the previous projection. By March 16, 1992, the total net building costs were determined to be approximately \$102 million.<sup>53</sup> Although this figure represented a significant increase from the originally anticipated \$33 million, the constant exchange of financial data among the board of directors, executive committee, audit committee, and new building committee enabled Lincoln Center to accommodate these demands and raise the funds necessary for successful completion of the project. In keeping with the tradition of close oversight and collaboration with the executive committee, there was a board resolution of financing approval the next month as the project was closed out.

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52. *E.g.*, Paul Goldberger, *A Shot of Cultural Adrenaline at Lincoln Center*, N.Y. Times, July 28, 1991, at H29.

53. Memorandum, Lincoln Center Rose Building—Construction and Endowment Goals—as of March 16, 1992 (on file with author).

*D. Further Observations of Governance Practices During the Rose Building Capital Project*

Lincoln Center's board and executive committee exercised oversight over the Rose Building construction project by thoughtfully considering resolutions and authorizing action when appropriate. Their decisions were based on their knowledge of the details of the project, including fund-raising strategies, building schedules, construction bidding, governmental approvals, complex legal agreements, community relations, and, of course, the costs and funds available. Their adherence to the duty of care is manifest in the paper trail of agendas, minutes, and corporate resolutions at the committee and overall board level that demonstrates an engaged and rigorous oversight of the project.

The board ensured that the requisite management infrastructure was in place and fully engaged, both by including the existing team of seasoned executives from the financial, legal, operational, public affairs, development, and other disciplines, and by adding new members from the architectural, construction, and project management fields. Those key staffers were accountable to the board through both regular meetings with certain trustees and frequent presentations to the executive committee and the board.

The board adapted its infrastructure to accommodate the needs for expertise and targeted oversight by establishing a new building committee and staffing it with experts in construction and real estate development; by using existing resources such as politically well-connected board members for governmental relations tasks; and by putting legal skills to work to consummate several complex real estate deals and facilitate requisite land use planning approvals. The board also refreshed the mandate of the existing general services committee to include the new building and created a new building operations committee to ensure that the new building would have a suitable governance infrastructure of its own. This new committee would carry out the agreements in principle that were reached in the participants' agreement among the eleven participating resident organizations. Some of the new infrastructure survived after the building was opened—the updated mandate of the general services committee and the new Rose Building operations committee—while other aspects of it, such as the new building committee, were discontinued when no longer needed.

Clearly the Lincoln Center board met and exceeded then current practices. It is even likely that the board during the time frame of the Rose Building project would be found to be in compliance with the heightened formulation of the duty of care now being articulated in some quarters, even though the project took place some fifteen to twenty-five years ago. A "duty of attention" was certainly fulfilled through frequent meetings with management and direct interaction with outside experts such as lawyers, construction managers, and consultants. The professional fund-raiser

retained by the board to carry out the capital campaign worked in conjunction with trustee fund-raising, and the board provided clear guidelines on the solicitation and use of funds.

As a further example of a duty of attention, the quorum provisions in the bylaws were enforced, ensuring a critical mass of attendance at board meetings. Other bylaws permitting board members to designate proxies at the annual meeting ensured that every board member had the opportunity to be adequately represented.

While key staff members and subcommittees managed the capital projects on a day-to-day basis, there was an appropriate degree of oversight and involvement by key trustees and the board as a whole. The importance of striking the right balance between trustee oversight and trustee micromanagement cannot be overemphasized.

In a recent report reviewing a series of large, publicly funded capital projects at the Kennedy Center in Washington, D.C., the U.S. Government Accountability Office stated that, “[a]lthough a board can delegate responsibilities to management, it remains responsible for overseeing management’s work.”<sup>54</sup> The Lincoln Center board strived for a suitable level of trustee involvement for the Rose Building project. As evidenced by meeting agendas, minutes and resolutions, the board regularly discussed strategy and policy issues and reviewed building plans. It established committees with requisite expertise to provide detailed oversight, and then the board or executive committee as a whole formally reviewed and approved and/or ratified all significant decisions regarding the capital construction.

The Sarbanes-Oxley-style updates to corporate governance arose substantially after the Rose Building was completed. Accordingly, the most visible manifestations of that new paradigm—whistle-blower policies, updated conflict of interest policies, updated audit committee charters calling for financially disinterested members with suitable expertise, and the like—were not enacted by the Lincoln Center board at that time. Such governance updates have, however, since been enacted by the institution.<sup>55</sup>

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54. U.S. Gen. Accounting Office, GAO-06-1025, Progress Made on GAO Recommendations, but Oversight Challenges Still Exist 36 (2006), *available at* <http://www.gao.gov/new.items/d061025.pdf>. The General Accounting Office found no evidence that the Kennedy Center board “approves the annual updates to the [comprehensive building plan], reviews management’s performance in implementing capital projects, or approves the annual capital project budget.” *Id.* Another complaint that the GAO articulated was that the Kennedy Center board did not review building plans, leaving such work exclusively to the operations committee, and did not discuss policy issues at its meetings. *Id.* at 37. The Kennedy Center rebutted many of the GAO’s critiques. *Id.* at 62–68.

55. LCPA Board and Members Meeting Minutes 6 (Dec. 16, 2002) (on file with author) (establishing separate finance committee); LCPA Annual and Regular Meeting of the Board and Members Minutes 21–22 (June 26, 2006) (on file with author) (updating audit committee charter, to require, among other things, disinterested members knowledgeable about financial matters; updating conflict of interest policy; and enacting whistle-blower policy).

### III. A NEW GENERATION OF MAJOR CAPITAL PROJECTS HERALDS LINCOLN CENTER'S FIFTIETH ANNIVERSARY CELEBRATION

#### *A. Planned Redevelopment Projects Center on 65th Street Corridor, Columbus Avenue Entrance, Josie Robertson Plaza, Harmony Atrium, and Central Mechanical Plant*

In 1998, Lincoln Center's board established a committee for the twenty-first century to examine Lincoln Center's future needs. Following a capital needs study by an outside architectural firm, the board in 1999 established a redevelopment committee, which was later incorporated as a freestanding 501(c)(3) organization known as the Lincoln Center Development Project, Inc. (LCDP). LCDP's members include the chairs of all the resident organizations and has been chaired by trustees experienced in construction, real estate development, and governance matters. In 2000, Lincoln Center negotiated a \$240 million contribution from the City of New York, reportedly the largest sum ever given by the City to a cultural institution.<sup>56</sup> Professional management and consultants were brought on board to work up plans for the campus's public spaces and theater interiors.

Following a period of vigorous discussion and debate, some of which erupted into the public sphere,<sup>57</sup> and after recovering from the devastating effects of the 9/11 attacks and the subsequent economic downturn, plans for redevelopment projects emerged. Under the leadership of Board Chairmen Bruce Crawford (2002–05) and Frank A. Bennack, Jr., (2005–present) and President Reynold Levy (2002–present), the projects include:

- 65th Street Redevelopment Project: 65th Street between Broadway and Amsterdam Avenue is being transformed into a "Street of the Arts," opening up Lincoln Center's 65th Street entrance to encourage the interaction of visitors, artists, teachers, and students. The street, revitalized with natural sunlight through the removal of the Milstein Plaza, will be lined on both sides with new building facades, innovative visitor information systems, dramatic lighting, and new indoor and outdoor facilities for dining and refreshments. There will be major facility expansions and a new destination restaurant with a public roof lawn on the North Plaza, a new retail shop, and a dramatic new street-level identity for six resident organizations: the Juilliard School, Film Society of Lincoln Center, Lincoln Center Theater, Lincoln Center, Inc., Chamber Music Society of Lincoln Center, and School of American Ballet. Alice Tully Hall, the 1095-seat theater, is undergoing its first renovation since it opened in 1969. The projected cost of the 65th Street Redevelopment Project, including

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56. Stamas & Zane, *supra* note 28, at 185.

57. See, e.g., Ralph Blumenthal, *Met Opera Rejects Plan for Renovation of Lincoln Center*, N.Y. Times, Jan. 24, 2001, at A1; Robin Pogrebin, *Met Is Rejoining the Project to Renovate Lincoln Center*, N.Y. Times, May 4, 2001, at E5.

constituent subprojects, is expected to exceed \$600 million, and the work is scheduled to be complete in 2009.

- **Promenade Project:** The Promenade Project is intended to redefine the front entrance of Lincoln Center, incorporating new architectural elements such as glass, travertine marble, new landscape features, and integrated information technologies for enhancing the visitor experience. The project will further unite Lincoln Center with the surrounding cityscape, rebuilding Lincoln Center's primary entryway along Columbus Avenue and upgrading and reenergizing the adjacent Josie Robertson Plaza. The project will also reconfigure the vehicular and pedestrian approach to the plaza from Columbus Avenue by sinking the existing service road that leads up to the plaza below street level, and dramatically expanding the current staircase to the plaza from the street. Josie Robertson Plaza—the central public space that includes the iconic Revson Fountain—also will be updated. The plaza pavement masonry will be totally renovated, and the fountain will be enhanced with new lighting, improved seating, and technical upgrades. The projected cost is somewhat less than \$200 million and is also expected to be complete in 2009.
- **Harmony Atrium Project:** The Harmony Atrium, a privately owned public space between Broadway and Columbus Avenues and West 62nd and 63rd Streets, is being transformed by Lincoln Center into a vibrant public community and cultural space offering performances, information, and discounted and advance ticket services. This work is expected to cost approximately \$15 million and should be complete in 2008–09.
- **Central Mechanical Plant:** Lincoln Center has also undertaken a comprehensive upgrade of its central mechanical plant, which is original to the center and has reached the end of its useful life. This work will likely cost approximately \$43 million and will be complete later this year.
- **Other projects:** Future Lincoln Center redevelopment projects anticipated over the balance of a decade will involve Avery Fisher Hall, Damrosch Park, and the New York State Theater.

### *B. Redeveloping Corporate Governance Structures*

As governance standards have evolved and plans for redeveloping the Lincoln Center campus have taken shape, so too have new governance structures and practices evolved at Lincoln Center.

Bucking the trend toward smaller boards—occasioned, some say, by the heightened duties imposed on volunteer trustees by the new post-Sarbanes-Oxley regime—the Lincoln Center board has undergone dramatic growth. Under a succession of three energetic chairmen—Beverly Sills, Bruce Crawford, and Frank Bennack—and the leadership of Lincoln Center

President Reynold Levy, working with the nominating and governance committee chaired at present by Thomas H. Lee, the board added a net of twenty members and has grown to approximately seventy-five in total. The enlarged board membership has brought not only new sources of funding, but also new energy, a diverse set of perspectives, and expertise in a variety of industries. New members have supplemented existing board expertise in construction, real estate, finance, public affairs, and other disciplines relevant to the projects being planned and underway.

For example, Katherine Farley, senior managing director of Tishman Speyer, the global real estate development and operations firm, joined the Lincoln Center board in 2003. In 2006, Farley was elected chair of the board of LCDP. The planning group for the Promenade Project is headed by Daniel Brodsky, a trustee from the New York City Ballet and one of New York's leading developers. The chairman of the financing task force, leading the undertaking of \$150 million or more in tax exempt borrowings to help finance the project, is Richard K. DeScherer. DeScherer, cochair of the law firm of Willkie Farr & Gallagher LLP, was one of the original draftsmen of the enabling legislation creating the New York City Trust for Cultural Resources, the issuer of the bonds. These trustees join board members of longer standing at Lincoln Center, who also bring considerable expertise in these and other relevant fields of endeavor.

LCPA has also enlarged its committee structure, adding a finance committee, new media committee, public affairs committee, campus-wide marketing steering committee, and others. In addition to creating these committees of the board, LCPA has harnessed expertise in various industries by creating advisory groups, fund-raising groups, and in-kind service providers, such as the Lincoln Center Counsels' Counsel, a group of major law firms and in-house counsel departments providing strategic and legal advice on a pro bono basis; a real estate and construction industry council; a business council; a conservancy to harness the support of neighboring businesses and residential buildings that benefit from proximity to Lincoln Center; and a hedge fund industry group that has provided an "annuity" to Lincoln Center's corporate fund through an industry gala each year since 2005. These initiatives, as well as the redevelopment projects themselves, have benefited all of the resident organizations across the campus.

The Lincoln Center project management entity, LCDP, through its staff of twenty employees and teams of outside architects, engineers, construction managers, and other consultants, has been able to realize efficiencies of scale on behalf of all the constituents pursuing redevelopment projects through centralized purchasing, management, and coordination of multiparty projects. LCDP itself has a robust board and committee structure, which includes a building advisory group consisting of leading industry experts. In addition to Brodsky, these experts include Carol Pittelman, head of construction for the Litwin Group, and Joel Pickett, president of Gotham Construction. Additionally, working groups of



representatives from each sector of the campus and an audit committee, which requires financial experience and financial independence of its members, are also included. The audit committee calls for a certain overlap with the LCPA finance or audit committee, providing cross-accountability, checks, and balances.

The LCPA staff, too, has been reenergized, reorganized, and diversified, adding positions such as executive director of the campaign (leading the capital fund-raising effort from private sources as well as unprecedented fund-raising from all three levels of government) and a vice president of consumer ventures (directing the Harmony Atrium effort as well as new technology initiatives, which include providing wireless Internet access in the public areas of the campus). There has been a redefinition of the marketing function to include a business development portfolio and a cross-campus coordination role. Efforts have been made to integrate new hires with longtime members of staff and to encourage greater interdisciplinary collaboration.

New pathways of communications have been carved among staff in the form of regular management committee meetings, such as between staff and board, between the chairs of the finance committee and audit committee and the chief financial officer, including discussions of direct oversight and accountability in appropriate cases, and between the chair of the legal committee and the general counsel. Accountability comes, too, in the form of "scorecards" to measure the organization's performance on behalf of its constituents, regular review of line employees by senior management and of senior management by trustees, and financial performance against stated benchmarks.

The president ensures that every trustee is fully apprised of and engaged in board matters, not only by careful placement of members on committees, but also by vigorous and energetic follow-ups. Indeed, the president sends a letter summarizing each executive committee and board meeting to any director who may have missed the meeting, usually within a day or two.

Board briefings, discussions, and resolutions are an important part of every major decision, including with respect to design, scope, cost, schedule, fund-raising, borrowings, and governmental and community affairs. The capital campaign, which is underway to pay for the physical improvements and also includes a significant endowment component, has resulted in anticipated increased operating costs brought about by the redeveloped facilities and expanded operations.

### *C. Economic Redevelopment for a New Era*

Lincoln Center is undergoing not only a physical transformation, but also an economic one. In an effort to make the organization more self-sustaining and less reliant on contributed income, the organization is diversifying income streams through greater entrepreneurial initiatives, exploiting its considerable intellectual property, for example, through a

book publishing deal with John Wiley & Sons, and leveraging its real estate assets through new catering, restaurant, garage, and hall rental initiatives.

#### IV. FURTHER OBSERVATIONS ON GOVERNANCE IN A REDEVELOPMENT ERA

Lincoln Center, like many of its not-for-profit brethren and for-profit cousins, has revisited its governance practices in light of recent heightened scrutiny and regulatory activity in the field. In accordance with evolving standards of good corporate practice, it has upgraded its audit committee charter; added a whistle-blower policy; refined its conflict of interest policy; updated its document management policies; reviewed its signing authorizations, procurement policies, and lobbying practices; and undertaken an executive compensation study using an outside consultant familiar with compensation at comparable institutions. The performance of its president and senior executives are regularly evaluated by the board and executive committee in executive sessions. The organization has developed a “scorecard” by which trustees may measure progress of the top twenty initiatives underway.

As Lincoln Center is in a redevelopment mode, good governance practices and strong internal controls are even more important. An enlarged board with considerable expertise in relevant subject areas—real estate, construction, finance, law, public affairs, and other disciplines—ensures competent oversight of management. A disciplined and integrated management team pursues goals in alignment with one another, with the board, and with the broader institutional mission. The organization’s growing program and its entrepreneurial initiatives, some of which are related to its expanding facilities, take the prior generation’s “revolution” to the next level.

The board and staff include longtime members as well as relative newcomers, providing both continuity and an invitation to shape the organization’s future.

Institutional memory is recorded and conveyed through the minutes, resolutions, memoranda, and other historic documents that formed the basis of this study. The organization, through a reshaped information resources department (formerly known as archives), has also recently developed intranet-based databases to preserve, organize, and make searchable and accessible board and committee materials and other institutional memory. Databases and other archival tools include both programmatic materials and the corporate records going back to the conception of the organization in 1955.<sup>58</sup>

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58. These databases were developed partially in response to best practices determined after 9/11.

## V. CONCLUSION AND SOME MORE QUESTIONS

Lincoln Center has achieved significant growth in both its physical resources and organizational capabilities, first during the Rose Building construction project and now during the current generation of redevelopment projects. The organizational and governance structures put into place for the first major capital project set the stage for expansions and transitions of the next generation.

The “revolutionary” pace of capital expansion, the transformation of the nonprofit balance sheet to a more entrepreneurial model, and the rapid evolution of standards of corporate governance raise many more questions to ponder. How do board members’ special roles during times of institutional transition affect their relationship with the institution? With its regular program? With the board members’ fund-raising activities during and after the transition? Should there be different or separate types of financial record keeping—for example, the Internal Revenue Service Form 990, GuideStar information, and state charitable contributions reporting—during capital campaigns and projects? Should the board authorize different (i.e., higher) levels of check-signing authority during major capital projects than during ordinary times? Should it permit different thresholds for financial controls on expenditures? For projects that are funded with public funds, in part (such as the Rose Building project and the redevelopment projects) or in whole (such as the Kennedy Center project), should there be a higher level of public accountability? If so, how should that be effectuated?

Although there is no one-size-fits-all model for nonprofit organizations undergoing significant transformations, the lessons learned and practices being developed today may provide some helpful guidance for other organizations, as well as set a precedent for itself for the next generation.

## *Notes & Observations*